

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 24 1969

PHILIP J. KENNEY,

Appellant,

vs.

AMERICAN CAN COMPANY,
a corporation,

Appellee

No. 22,236 ✓

PETITION FOR REVIEW

APPELLANT'S APPENDIX

Appeal from the United States District Court

for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

Philip J. Kenney, Appellant
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MR. DELOACH

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILIP J. KENNEY,)
)
Appellant,)
)
vs.)
)
AMERICAN CAN COMPANY,)
a corporation,)
)
Appellee)

No. 22,236

PETITION FOR REVIEW

The appellant petitions this court for a rehearing because of his inexperience, and while acting without benefit of counsel, has in his opinion, caused this court to misapprehend the undisputable facts that would enable this court to reverse the judgment against him from the court below.

It is the opinion of the appellant that if this court had been informed that appellant's trial was held without prior notice of such, but at the time when appellant appeared upon notice for a hearing on the motion for summary judgment and dismissal. This is not in criticism of the court below, but rather in the opinion of the appellant, the court below after having been informed by the plaintiff that he was unprepared for a trial, did the only just thing possible; dismiss the case with prejudice, which would open the way for the appellate court to delve as deeply as need be without placing the appellant (a lay person) in a position to reflect adversely on the decision of the court below.

The appellant, having reviewed his case in retrospect, can now cite those facts and law which will clearly confirm his complaint, that this court will have just cause to reconsider its finding. The appellant lists the following facts and law which can be verified by the record, and are absolute:

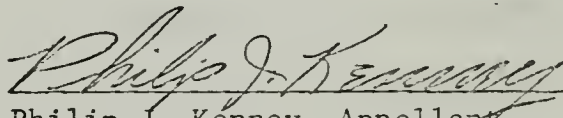
1. The appellee would have to prove that appellant did not disclose the use of an adhesive.

2. It would also have to establish its claim (Appellee's Brief, p. 23) that appellant disclosed only a two part tear strip.

3. Appellee can absolutely do neither as a matter of law for the following reasons: (a) Appellee does not deny, but admits, appellant did disclose the idea of adhering directly to cans - a strip. (See Appellee's Brief, pp. 20-21.) (b) Appellee's allegation that appellant disclosed only a two part tear strip constructure (Appellee's Brief, p. 23) is estopped by law because of its earlier evaluation that has been validated by the appellee's own actions. Said evaluation is cited in a letter dated October 26, 1955 (see R-50) from a Mr. George Reiber, an attorney employee of the appellee, wherein he says: *The fact that the tearing or opening strip which you suggested...* and validated by the appellee's failure in its letter of January 9, 1956 (see R 52-53) to designate or give any other interpretation for what was meant by opening strip. (c) The bare fact that appellee is adhering directly to cans a strip, as was suggested by the appellant (irregardless whether it is singular or plural), constitutes an appropriation which appellee was not authorized to use by appellant.

(d) The appellee did not require a formal agreement to be signed in connection with the August 1955 disclosure but did through implication, by identifying the two submissions together as *substantially the same*, as stated in the January 9, 1956 (see R 52-53) letter from appellee, agreed to compensate for anything disclosed and used as cited in paragraph G of the formal agreement. Therefore, the appellee cannot now evoke any of the stipulations of the formal agreement in defense of its appropriation. (e) The fact that appellee is obligated to pay for anything disclosed to it was admitted by the appellee upon questioning by the court at the hearing of the appeal. (f) It becomes evident that appellee stands in breach of such agreement and is obligated by law to make such amends as appropriate.

The fact that this court has grounds upon which to base its action for reconciling its finding and reversing the judgment from the court below, cannot be disputed. And, with due consideration of this court and in behalf of those (my family) who have so gallantly sacrificed for this action, this appendix is respectfully submitted.


Philip J. Kenney, Appellant,
submitting in Propria Persona

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 14 1967

WM. B. LUCK, CLERK

PHILIP J. KENNEY,

Appellant

vs.

AMERICAN CAN COMPANY,
a corporation,

Appellee

No. 22,236

APPELLANT'S BRIEF

Appeal from the United States District
Court for the District of Oregon,
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JURISDICTIONAL STATEMENT

The jurisdiction of the District Court was based upon diversity of citizenship and 28 U.S.C.A., Sec. 1332. The complaint alleges a controversy exceeding \$10,000 between plaintiff, a citizen of Oregon and the defendant, a corporation incorporated under the laws of the State of New Jersey, having its principle place of business in a state other than the State of Oregon, and authorized to do business in Oregon.

APPELLANT'S REFERENCE CITATIONS

1. McEven vs. Kelly-Koett Mfg., D.C.E.D. Ky., 34f. Supp. 351, 2"
2. Hamilton National Bank vs. Belt, 210 F. 2d 962, 968. 6"
3. Booth vs. Stutz Motor Car Co., 56 F. 2d 962, 968. 1"
4. Alexander Milburn Co. vs. Davis-Bournoville, 270 U.S. 390 (1926)
5. Grepke vs. General Electric Co., 126 U.S. P.Q. 93 (7th Cir. 1960)
6. Minnesota Mining & Mfg. Co. vs. Technical Tape Co. (123 U.S. P.Q. 96 N.Y. Sup. Ct. 1959)
7. Charlie Chaplan vs. Charles Amador (18 Trade Mark Reporter 541)
8. Ed Sullivan vs. Edward Sullivan Radio and Television dealer (110 U.S. P.Q. 106)
9. Franke, et. al., (Q-W Laboratories vs. Wiltschek et. al. 209 F. 2d 493 (99 U.S. P.Q. 431)
10. 209 F. 2d 493, 395 (99 U.S. P.Q. 431, 433).
11. Smith, et. al. vs. Dravo Corp., 208 F. 2d 388 (99 U.S. P.Q. 384).

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AMERICAN CAN COMPANY,)
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Appellee)

No. 22,236
APPELLANT'S BRIEF

The appellant offers this brief in support of his appealed civil action.

It should be noted that the appellant (a tradesman) is not representing himself by choice but through necessity, having tried a number of times to secure counsel, but to no avail. It now has become the opinion of the appellant that this inability stems from a disagreement between the appellant and his originally retained counsel over a proposed settlement of his grievance. The reasons will be obvious further on.

The appellant realizes that he has created an unusual situation by attempting to act as his own counsel. However, this does not change in any way the fact that the appellee has misappropriated the appellant's

personal property, which has resulted in breaching a confidential and/or contractual relationship between the parties. These relationships became implicit by the appellee's act of identifying, in a letter of determination dated January 9, 1956 (Transcript of Record, p. 12), a previously rejected disclosure of August 1955 with a later accepted disclosure of November 1955 as being "Substantially the same". Thus, the appellant was granted the right to expect compensation, if used in a substantial manner as provided for in paragraph (G) of the Formal Agreement, Form 2538 (Transcript of Record, p. 17), wherein it says:

"in case you decide to use my idea substantially as disclosed to you, negotiate with me for the right to use it upon such written terms as may be mutually agreed upon." (Transcript of Record, p. 18)

The appellee owed a duty of secrecy to the appellant prior to consummation of any agreement. Thus, the appellee incurred the aforementioned breach of confidence. The appellee's act of breaching the said relationships came about when appellee manufactured in substantial amounts for commercial purposes, cans utilizing aluminum foil strips adhered directly to the sides of can to facilitate an easy opening seal. (See exhibits.) This was disclosed to the appellee in the August 1955 disclosure. This is better put in the letter of September 22, 1965 (Transcript of Record, pp. 68A-69) from (the then) legal counsel of the appellant to the appellee's attorney employee stating without reservation that the appellee had misappropriated the appellant's property. This accusation brought an immediate reply and an offer to resolve this matter in a letter dated October 5, 1965 (Transcript of Record, pp. 69-70). The offer was accepted and a meeting resulted on the morning of December 1, 1965 wherein the possibility of having the appellee take a license on

the appellant patent 3,096,905 to settle the appellant's grievance was seriously explored. (See letter of January 6, 1966, Transcript of Record, p. 71.) Herein tacit agreement with appellant's grievance is evident.

The proposition made to appellant was unacceptable. It consisted of an offer to license the appellant's patent 3,096,905 and for a general release of any claims the appellant had against the appellee, in return for a small consideration and possible royalties if the patent was used. Appellant's refusal, on the ground that it was ridiculous, resulted in a heated argument and termination of the contingency agreement between the appellant and his counsel. In view of the directness in the letter of September 22, 1965, as mentioned above, why should the appellant's counsel expect him to give such concessions as licensing his patent 3,096,905, and giving the appellee a general release? Especially, when counsel knew that the supposed development that generated interest in the appellant's patent, as was declared in the letter of October 5, 1965, was unsuccessful and apparently abandoned prior to the appellee's offer of December 1, 1965. (It should be known that the appellant knew nothing of the letter of September 22, 1965, nor the letter of October 5, 1965, until receipt thereof in the appellant's copy of the Pretrial Order.) The appellant's effort to find out what happened at the December 1, 1965 meeting between the appellee's attorney employee and the appellant's (then) counsel was promptly objected to by the opposing counsel on the grounds that it would be a breach of the professional code of ethics. Appellant was attempting to determine by questioning at the trial, what took place to bring about this change of attitude as can be seen by comparing the letter of September 22, 1965 with the attitude shown in the letter

of December 15, 1965. (Transcript of Record, p. 70) The question of breach of professional code of ethics appears to be both ridiculous and questionable. After all, the witness was under contract to the appellant at the alleged time of the meeting and any information concerning the meeting belongs to and should become the property of his client. If the appellee has nothing to hide as the appellant was admonished at the taking of his deposition (See Deposition, p. 2, line 19) why then, does the appellee object to such questioning. This attitude is not consistent with that which was told to appellant concerning asking questions (Appellant Deposition, p. 2-3). Also, if it is true that the appellee has nothing to hide and only wants to bring out the facts and relevant material, why then did the appellee present to the appellant four patents the afternoon before the day of the taking of the deposition and then question him in a leading manner in the highly technical language of the patents, when it was known that the appellant never completed grade school and was acting without benefit of counsel. Why was this material introduced in the first place? IT IS IRRELEVANT TO THE CASE BECAUSE by no stretch of the imagination can any rights be construed to do so, this is not a patent issue! Certainly, the appellee can claim no rights under the formal agreement because the appellee waived any rights by it's implied agreement and no rights were reserved. The lack of interest in 1955 was based on the "unwarrented cost" at the time.

The appellant again called the appellee's attention to his keyless type can opener on October 14, 1962, but without submitting again. Then, a little over two months (the "two year" in the Deposition is in error) later, on December 20, 1962, the appellee filed for patent that

did issue under No. 3,186,581. This contained the adhering of an aluminum strip direct to the can body and top acting as an easy opener and seal, as was suggested in the August 1955 disclosure of the appellant's.

The appellee alleges that the appellee's acts of patenting and manufacturing commercially cans utilizing the principle of adhering an aluminum foil strip, or in fact any material to cans to facilitate a seal or easy opener, (See appellant's exhibits) and which was disclosed to the appellee in the August 1955 disclosure and which was not authorized to use, breached a contractual relationship and consequently a duty of confidence owed the appellant.

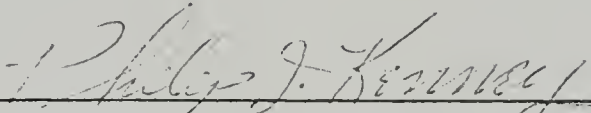
The appellant alleges further, that the appellee must have known about the appellant's 1955 submission at time of filing for patent that issued as 3,186,581 because of the file number at the top of the October, 1962 correspondence being the same (which appellee contends is only a general file number) and certainly the appellee must make a search of these files before filing a patent application. Also, the attorney employee, Mr. George W. Reiber who handled the 1955 submissions, was also one of the prosecuting attorneys for the appellee's application and whose name appears on the patent as such.

It should become apparent to this court from this account and the accompanying record that this court should reverse the verdict of the appellant's civil action by the U.S. District Court for the District of Oregon and appoint a master to interceed in an accounting for the appellant. Appellant prays that this court will reverse the verdict

in order to prevent manifest injustice.

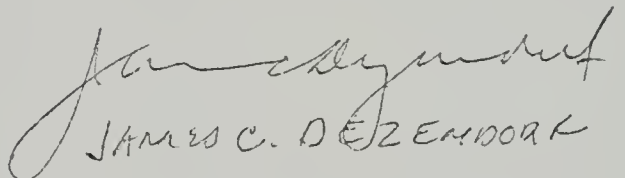
This Brief is

Respectfully submitted,


Philip J. Kenney, Appellant, appearing
in Propria Persona

SERVICE ACCEPTED THIS 7TH DAY OF NOVEMBER

1967.


JAMES C. DEZEMORK

ONE OF ATTORNEYS FOR APPELLEE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Philip J. Kennedy
Appellant, appearing in Propria Persona

